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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SOLOMON KELLY, JAMES )  
MOLINA, AS INDIVIDUALS )  
AND ON BEHALF OF ALL )  
OTHER SIMILARLY )  
SITUATED, )  
Plaintiffs, )  
v. )  
BEAZER HOMES USA, INC.; )  
BEAZER HOMES HOLDINGS )  
CORP.; BEAZER MORTGAGE )  
CORPORATION; AND DOES 1 )  
THROUGH 10, INCLUSIVE, )  
Defendants. )

Case No. EDCV 09-01674  
VAP (DTBx)

**[Motion filed on January 22,  
2010]**

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS FOR LACK  
OF STANDING, WITH PREJUDICE,  
AND DENYING DEFENDANTS'  
MOTION TO STRIKE AS MOOT**

Defendants' Motions to Dismiss and to Strike came before the Court for hearing on March 15, 2010. After reviewing and considering all papers filed in support of, and in opposition to, the Motions, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion to Dismiss and DENIES the Motion to Strike as moot.

1 I. BACKGROUND

2 A. Plaintiffs' Allegations

3 Plaintiff Solomon Kelly ("Kelly") alleges he  
4 purchased a new residence in September 2005 in San  
5 Bernardino County, California from Beazer Homes, made a  
6 down payment of about 50%, financed the balance through  
7 Beazer Mortgage Corporation ("Beazer Mortgage"), and  
8 still owns and occupies the residence. (First Amended  
9 Complaint ("FAC") ¶ 39.)

10  
11 Plaintiff James Molina ("Molina") alleges he  
12 purchased a new residence in January 2006 in Riverside  
13 County, California from Beazer Homes, made a down payment  
14 of 20%, and still owns and occupies the residence. (FAC  
15 ¶ 40.)

16  
17 Plaintiffs Kelly and Molina (collectively,  
18 "Plaintiffs") bring this putative class action on behalf  
19 of themselves and a national class including "[a]ll  
20 Beazer Homes customers who purchased a new Beazer Homes  
21 house from January 1, 2004, through December 31, 2006,  
22 and put 20% or more down toward the purchase of the  
23 house[,] or alternatively, "a class of new Beazer Homes  
24 customers whose homes are located in California." (FAC  
25 ¶¶ 53-54.)

1 Plaintiffs allege "on information and belief" that  
2 before 2004, Defendants Beazer Homes USA, Inc., Beazer  
3 Homes Holdings Corp., and Beazer Mortgage (collectively,  
4 "Defendants" or "Beazer Defendants") implemented a  
5 "scheme" to increase the number of houses sold and to  
6 increase the amount of profit per sale. (FAC ¶ 19.) The  
7 "scheme" was intended to "convince government entities,  
8 then the community, and finally buyers that Defendants  
9 were building a traditional neighborhood with stable  
10 owners who occupied their homes and who were vested in  
11 the community and the neighborhood." (FAC ¶ 20.)  
12 "Implicit in this marketing scheme was that Defendants  
13 were making a good-faith effort to sell homes to buyers  
14 who [Defendants] expected could afford to buy the houses  
15 and would be stable neighbors." (Id.)

16  
17 Plaintiffs allege that they were provided "marketing  
18 materials that depicted the community as a stable,  
19 family[-]based neighborhood." (FAC ¶¶ 39, 40.)  
20 Plaintiffs also allege "on information and belief" that  
21 Defendants represented that they did not sell houses in  
22 Plaintiffs' neighborhoods to investors who would not  
23 occupy the houses. (FAC ¶¶ 26, 29, 39, 40.)

24  
25 Plaintiffs allege Defendants engaged in a scheme to  
26 market the houses to, and provide financing for,  
27 "unqualified buyers who posed an abnormally high risk of  
28

1 foreclosure . . . to increase both the number of sales  
2 and the prices of the houses in same neighborhoods in  
3 which Defendants were selling to traditionally qualified  
4 and low-foreclosure- risk buyers." (FAC ¶ 21.)  
5 Plaintiffs generally allege that Defendants assisted and  
6 encouraged the "unqualified" buyers to appear qualified.  
7 (FAC ¶ 24.)

8  
9 Plaintiffs assert that Defendants "concealed and  
10 intentionally failed to disclose to prospective buyers .  
11 . . . that numerous houses in the neighborhoods were being  
12 purchased by unqualified and high-foreclosure-risk  
13 buyers, despite Defendants' knowledge that this could,  
14 and likely would over time, have a material negative  
15 effect on the value and desirability of the house and the  
16 neighborhood." (FAC ¶ 30.)

17  
18 Plaintiffs allege two theories of harm stemming from  
19 Defendants' conduct. First, Plaintiffs allege they "paid  
20 inflated prices for their houses" as a result of  
21 Defendants' failure to disclose that "Defendants had sold  
22 houses . . . to unqualified and high-foreclosure-risk  
23 buyers. . . [and] to investors who would not occupy the  
24 houses." (FAC ¶¶ 31, 33, 35, 48, 52.) Secondly,  
25 Plaintiffs allege they suffered an injury years after  
26 purchasing their houses when the real estate market  
27 declined and the "unqualified" buyers defaulted on their  
28

1 loans and lost their houses in foreclosure proceedings,  
2 which led to a decline in the value of Plaintiffs'  
3 residences. (FAC ¶¶ 27, 32, 33.)  
4

5 **B. Procedural History**

6 On September 3, 2009, Plaintiff Kelly filed a  
7 putative class action against Defendants. On the same  
8 day, Plaintiff's counsel filed seven other similar class  
9 actions<sup>1</sup> ("Homebuilder Actions") alleging that the  
10 homebuilder defendants and their mortgage lending  
11 affiliates engaged in conduct that "artificially  
12 inflated" the purchases prices of plaintiffs' residences  
13 and eventually reduced their value.  
14

15 On October 23, 2009, Defendants joined in a "Motion  
16 to Consolidate," which sought to consolidate the eight  
17 Homebuilder Actions. The Court denied the Motion to  
18

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19 <sup>1</sup> The Homebuilder Actions are:

- 20 • Dodaro v. Standard Pacific Corp., et al., ED09-  
21 CV1666-VAP (OPx)  
22 • Stephens, et al. v. Lennar Corp, et al., ED09-CV1668-  
23 VAP (DTBx)  
24 • Lumalu et al. v. Richmond American Homes Corp., et  
25 al., ED09-CV1669-VAP (OPx)  
26 • Oneto v. The Ryland Group, Inc., et al., ED09-CV1670-  
27 VAP (DBTx)  
28 • Maya, et al. v. Centex Corp., et al., ED09-CV1671-VAP  
(OPx)  
• Martinez, et al. v. D.R. Horton, et al., ED09-CV1672-  
VAP (DBTx)  
• Nielson, et al. v. Shea Homes, Inc, et al., ED09-  
CV1673-VAP (DTBx)  
• Kelly, et al. v. Beazer Homes USA, Inc., et al.,  
ED09-CV1674-VAP (DTBx)

1 Consolidate. On November 18, 2009, the Homebuilder  
2 Actions were transferred to this Court. On December 21,  
3 2009, Plaintiff Kelly and a newly added plaintiff,  
4 Plaintiff Molina, filed the FAC, which added allegations  
5 regarding the Defendants. The substance of the claims  
6 remains unchanged.

7  
8 Plaintiffs allege five claims: (1) fraud; (2)  
9 negligent misrepresentation; (3) violation of  
10 California's Unfair Business Practices Act, Cal. Bus. &  
11 Prof. Code §§ 17200, et seq.; (4) violation of Cal. Bus.  
12 & Prof. Code §§ 17500, et seq.; and (5) breach of the  
13 implied covenant of good faith and fair dealing.

14  
15 On January 22, 2010, Defendants filed: (1) a Motion  
16 to Dismiss ("Motion"), (2) a Motion to Strike Portions of  
17 the First Amended Complaint, and (3) a Request for  
18 Judicial Notice. On February 22, 2010, Plaintiffs filed  
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1 Opposition<sup>2</sup> to both Motions. On March 4, 2010,  
2 Defendants filed a Reply for both Motions.

3  
4 Defendants argue the FAC should be dismissed for the  
5 following reasons: (1) Plaintiffs lack constitutional  
6 standing to bring this action; (2) Plaintiffs fail to  
7 allege their fraud-based claims with particularity as  
8 required by Rule 9(b); (3) Plaintiffs fail to state a  
9 claim as to each cause of action under 12(b)(6). (Mot.  
10 at 1.)

11  
12 **II. LEGAL STANDARD FOR MOTION TO DISMISS UNDER**  
13 **RULE 12(b)(6)**

14 Rule 12(b)(6) allows a party to bring a motion to  
15 dismiss for failure to state a claim upon which relief  
16 can be granted. As a general matter, the Federal Rules  
17 require only that a plaintiff provide "'a short and plain  
18 statement of the claim' that will give the defendant fair  
19 notice of what the plaintiff's claim is and the grounds  
20

21 \_\_\_\_\_  
22 <sup>2</sup> Counsel for the plaintiffs in the eight Homebuilder  
23 Actions divides the subject matter of the oppositions to  
24 Homebuilder Defendants' Motions as follows:

- 25 • Stephens, et al. v. Lennar Corp, et al., ED09-CV1668-  
26 VAP (DTBx): Plaintiffs' Opposition addresses  
27 constitutional standing ("Stephens Opp'n").
- 28 • Oneto v. The Ryland Group, Inc., et al., ED09-CV1670-  
VAP (DBTx): Plaintiffs' Opposition addresses  
Plaintiffs' UCL claims and claims for breach of the  
implied covenant of good faith and fair dealing  
("Oneto Opp'n").
- Nielson, et al. v. Shea Homes, Inc, et al., ED09-  
CV1673-VAP (DTBx): Plaintiffs' Opposition addresses  
Rule 9 ("Nielson Opp'n").

1 upon which it rests." Conley v. Gibson, 355 U.S. 41, 47  
2 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic  
3 Corp. v. Twombly, 550 U.S. 544, 555 (2007). In addition,  
4 the Court must accept all material allegations in the  
5 complaint -- as well as any reasonable inferences to be  
6 drawn from them -- as true. See Doe v. United States,  
7 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S.  
8 Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

9  
10 "While a complaint attacked by a Rule 12(b)(6)  
11 motion to dismiss does not need detailed factual  
12 allegations, a plaintiff's obligation to provide the  
13 'grounds' of his 'entitlement to relief' requires more  
14 than labels and conclusions, and a formulaic recitation  
15 of the elements of a cause of action will not do." Bell  
16 Atlantic, 550 U.S. at 555 (citations omitted). Rather,  
17 the allegations in the complaint "must be enough to raise  
18 a right to relief above the speculative level." Id.

19  
20 In other words, the allegations must be plausible on  
21 the face of the complaint. See Ashcroft v. Iqbal, 556  
22 U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009). "The  
23 plausibility standard is not akin to a 'probability  
24 requirement,' but it asks for more than a sheer  
25 possibility that a defendant has acted unlawfully. Where  
26 a complaint pleads facts that are 'merely consistent  
27 with' a defendant's liability, it stops short of the line  
28

1 between possibility and plausibility of 'entitlement to  
2 relief.'" Id. (citations and internal quotations  
3 omitted).

4  
5 Although the scope of review is limited to the  
6 contents of the complaint, the Court may also consider  
7 exhibits submitted with the complaint, Hal Roach Studios,  
8 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19  
9 (9th Cir. 1990), and "take judicial notice of matters of  
10 public record outside the pleadings," Mir v. Little Co.  
11 of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

12  
13 "Failure to properly allege standing is a ground for  
14 dismissal under Rule 12(b)(6)." MAI Sys. Corp. v. UIPS,  
15 856 F. Supp. 538, 539 (N.D. Cal. 1994), citing W. Mining  
16 Council v. Watt, 643 F.2d 618 (9th Cir. 1980).

### 17 18 **III. DISCUSSION**

19 Article III of the Constitution gives federal courts  
20 jurisdiction over "cases and controversies." U.S. Const.  
21 Art. III, § 2, cl. 2. "In essence the question of  
22 standing is whether the litigant is entitled to have the  
23 court decide the merits of the dispute or of particular  
24 issues." Warth v. Seldin, 422 U.S. 490, 498 (1975).  
25 Standing, therefore, is a threshold issue in every  
26 federal case. Elk Grove Unified Sch. Dist. v. Newdow,  
27 524 U.S. 1, 11 (2004) ("In every federal case, the party  
28

1 bringing the suit must establish standing to prosecute  
2 the action."); Warth, 422 U.S. at 517-18; McMichael v.  
3 County of Napa, 709 F.2d 1268, 1269 (9th Cir. 1983)  
4 ("Before the judicial process may be invoked, a plaintiff  
5 must 'show that the facts alleged present the court with  
6 a 'case or controversy' in the constitutional sense and  
7 that [he] is a proper plaintiff to raise the issues  
8 sought to be litigated.'"), citing Linda R.S. v. Richard  
9 D., 410 U.S. 614, 616 (1973).

10  
11 To satisfy the "case or controversy" requirement, a  
12 plaintiff "must demonstrate that he has suffered an  
13 'injury in fact'" that a favorable judgment will redress.  
14 Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Newdow,  
15 542 U.S. at 12, citing Lujan v. Defenders of Wildlife,  
16 504 U.S. 555, 560-561 (1992). In other words, a  
17 plaintiff must demonstrate: (1) he has suffered an  
18 "'injury in fact' -- an invasion of a legally protected  
19 interest which is (a) concrete and particularized, and  
20 (b) actual or imminent, not conjectural or hypothetical";  
21 (2) there is a causal connection between the injury and  
22 the conduct complained of -- that is, the injury is  
23 "fairly traceable" to the challenged action of the  
24 defendant, and not the result of the independent action  
25 of some third party not before the court; and (3) it is  
26 "likely," as opposed to merely "speculative," that the  
27 injury will be redressed by a favorable judicial  
28

1 decision. Lujan, 504 U.S. at 560-61 (footnote,  
2 citations, and quotation marks omitted).

3  
4 The party invoking federal jurisdiction bears the  
5 burden of establishing the elements of standing. Lujan,  
6 504 U.S. at 561, citing FW/PBS, Inc. v. Dallas, 493 U.S.  
7 215, 231 (1990); Warth, 422 U.S. at 508. As the three  
8 elements of standing "are not mere pleading requirements  
9 but rather an indispensable part of the plaintiff's case,  
10 each element must be supported in the same way as any  
11 other matter on which the plaintiff bears the burden of  
12 proof, *i.e.*, with the manner and degree of evidence  
13 required at the successive stages in litigation." Lujan,  
14 504 U.S. at 561; Lujan v. Nat'l Wildlife Fed'n, 497 U.S.  
15 871, 883-89 (1990); Gladstone Realtors v. Village of  
16 Bellwood, 441 U.S. 91, 114-15 & n.31 (1979); Simon v. E.  
17 Kentucky Welfare Rights Org., 426 U.S. 26, 45 & n.25  
18 (1917); Warth, 422 U.S. at 527 & n.6). "At the pleading  
19 stage, general factual allegations of injury resulting  
20 from the defendant's conduct may suffice . . . ." Id.,  
21 citing Nat'l Wildlife Fed'n, 497 U.S. at 889.

22  
23 Plaintiffs must satisfy Article III standing  
24 requirements to assert each of their claims in federal  
25 court. As Plaintiffs' claims all are founded upon the  
26 same alleged injuries, the Court's analysis applies to  
27 each of them. Plaintiffs fail to establish standing  
28

1 because they have not pled an injury in fact and have not  
2 shown how their alleged injuries are "fairly traceable"  
3 to Defendants' alleged actions.

4  
5 **A. Injury in Fact**

6 Defendants first focus on whether Plaintiffs have  
7 suffered a "concrete and particularized, and actual or  
8 imminent" injury necessary to meet the first element of  
9 Article III standing. Lujan, 504 U.S. at 560-61. To  
10 satisfy the "injury in fact" requirement, "[t]he  
11 plaintiff must show that he has sustained or is  
12 immediately in danger of sustaining some direct injury as  
13 a result of the [defendant's] conduct and the injury or  
14 threat of injury must be both real and immediate, not  
15 conjectural or hypothetical." City of Los Angeles v.  
16 Lyons, 461 U.S. 95, 101-02 (1983) (citations omitted);  
17 Lujan, 504 U.S. at 560 ("[By injury in fact we mean] an  
18 invasion of a legally protected interest which is (a)  
19 concrete and particularized, . . . and (b) actual or  
20 imminent, not 'conjectural' or 'hypothetical'").

21  
22 As noted above, Plaintiffs allege they were injured  
23 by (1) paying "inflated" purchase prices for their houses  
24 as a result of the "buying frenzy" created because  
25 Defendants sold houses to "unqualified" buyers  
26 ("overpayment theory") (FAC ¶¶ 31, 33, 35, 48, 52), and  
27 (2) suffering a reduction in the value of their  
28

1 properties caused by Defendants' wrongful acts and  
2 omissions ("reduced-value theory") (FAC ¶¶ 27, 32, 33).  
3 These alleged harms fall short of a concrete, particular,  
4 and actual injury.

5  
6 **1. Reduced-Value Theory**

7 The Court first considers Plaintiffs' reduced-value  
8 theory. Plaintiffs still own their houses, so their  
9 assertions of loss are conjectural. Any loss (or gain)  
10 -- presumably measured against the initial purchase price  
11 -- cannot be ascertained, nor measured, unless and until  
12 the owner sells the house. See Phillips v. Frank, 295  
13 F.2d 629, 632 (9th Cir. 1961) (recognizing that a gain or  
14 loss in real property cases is determined at the time of  
15 sale).

16  
17 Moreover, the cause of any such loss cannot be  
18 determined until that time as well. In other words,  
19 Plaintiffs have alleged only harm which, rather than  
20 being specific and concrete, is general and tied so  
21 closely to pervasive economic conditions and harms, that  
22 it does not suffice as an allegation of direct injury.  
23 See First Nationwide Bank v. Gelt Funding Corp., 27 F.3d  
24 763, 770 (2d Cir. 1994) (recognizing that a number of  
25 variables can affect real estate values).

1 Other courts have reached the same conclusion when  
2 faced with nearly identical allegations. See Kaing v.  
3 Pulte Homes, Inc., No. 09-5057, 2010 WL 625365, at \*5-6  
4 (N.D. Cal. Feb. 18, 2010); Tingley v. Beazer Homes Corp.,  
5 No. 07-176, 2008 WL 1902108, at \*5, n.3 (W.D.N.C. April  
6 25, 2008) ("harm is only realized if Plaintiffs sell  
7 their home."); Green v. Beazer Homes Corp., No. 07-1098,  
8 2007 WL 2688612, at \*3 (D.S.C. Sept. 10, 2007)  
9 (dismissing the action because "Plaintiff does not . . .  
10 suggest that she or any of her other similarly 'injured'  
11 neighbors have realized this decrease in value (e.g., as  
12 a result of sale of the home).").

13  
14 In Kaing, the district court found that a plaintiff  
15 in a putative class action against defendant homebuilders  
16 lacked standing to assert a theory "that she ha[d] been  
17 injured because [the homebuilders'] lending practices  
18 caused widespread foreclosures in her neighborhood,  
19 [which had] driven down the value of her house." 2010 WL  
20 625365, at \*5. There, the plaintiff alleged that the  
21 defendants "marketed the neighborhoods as stable and  
22 desirable neighborhoods, while becoming even more  
23 aggressive in selling homes to unqualified and high-  
24 foreclosure-risk buyers . . . ." Id. at \*2. The  
25 plaintiff alleged that high foreclosure rates in her  
26 neighborhood decreased the value of her house by over  
27 50%. Id.

28

1           Furthermore, the Kaing defendant homebuilders'  
2 misconduct also allegedly "result[ed] in abandoned  
3 houses; multiple families living in one home; transient  
4 neighbors with no long-term ties to the neighborhood;  
5 unfinished yards and unkempt yards; and, in some cases,  
6 increased crime." Id. at \*5. There, as here, the  
7 plaintiff still owned her residence when she brought the  
8 action. Id. at \*1-2. Also like the Plaintiffs here, the  
9 Kaing plaintiff alleged she was harmed by the homebuilder  
10 defendants' failure to provide her with a disclosure that  
11 "Defendants had sold houses, and would sell houses in the  
12 future, to unqualified and high-foreclosure-risk buyers."  
13 Id. at \*2.

14  
15           Distinguishing "general economic harms" from the harm  
16 in cases where a plaintiff's injury arose from a physical  
17 change to the neighborhood's environment, the Kaing court  
18 noted, "[A] decline in value that is tied to a purely  
19 economic change to a neighborhood is much more difficult  
20 to characterize as 'concrete and particularized, and  
21 actual or imminent.' Such economic conditions are likely  
22 to change with the broader economy, and any decline in  
23 housing value can potentially evaporate before Plaintiff  
24 has suffered a concrete injury, even in the absence of  
25 redress from the courts." Id. at \*5, citing Lujan, 504  
26 U.S. at 560-61. As the plaintiff had not sold, or even  
27 attempted to sell, her house under the changed economic  
28

1 conditions, the court concluded, "[I]t is not clear that  
2 the diminished value of her house is cognizable as an  
3 'injury in fact.'" Id.

4  
5 In reaching its conclusion, the Kaing court relied on  
6 two other cases arising under similar circumstances --  
7 Tingley and Green. In both cases, the plaintiffs filed  
8 putative class actions against defendant homebuilders,  
9 claiming the defendants targeted low-income purchasers,  
10 which resulted in high rates of foreclosure in  
11 plaintiffs' neighborhoods and consequently decreased the  
12 value of the plaintiffs' residences. See Tingley, 2008  
13 WL 1902108, at \*1-2; Green, 2007 WL 2688612, at \*2.

14  
15 Although the Tingley court premised its holding on  
16 lack of causation rather than injury in fact, the court  
17 noted, "Since the reduced value about which Plaintiffs  
18 complain would have resulted from an economic glut of  
19 supply, then such harm is only realized if Plaintiffs  
20 sell their home during such glut. If Plaintiffs chose to  
21 remain in their home until more favorable economic  
22 conditions arrive, then they will have realized no loss  
23 at all." Tingley, 2008 WL 1902108, at \*5, n.3.

24  
25 The Green court adopted similar reasoning, holding  
26 that although the plaintiff alleged an injury in the form  
27 of a generalized loss in the potential market value of  
28

1 her house due to excessive foreclosures on other houses  
2 in her neighborhood, she did not "suggest that she or any  
3 of her other similarly 'injured' neighbors [had] realized  
4 this decrease in value (e.g., as a result of sale of the  
5 home)." Green, 2007 WL 2688612, at \*3. The court thus  
6 concluded that the plaintiff's injury was neither  
7 concrete nor particularized. Furthermore, it reasoned,  
8 "the alleged cause of the decreased value (excessive  
9 foreclosures) is of a type which would not necessarily  
10 have a long term impact on home prices. This strongly  
11 suggests that the injury is conjectural and speculative,  
12 and not actual or imminent." Id., citing Lujan, 504 U.S.  
13 at 560-61.

14  
15 Here, Plaintiffs have not sold their houses at a loss  
16 or suffered any actual loss arising from the harms they  
17 allege in the FAC. (See FAC ¶¶ 39, 40.) Thus, like the  
18 plaintiffs in Kaing, Tingley, and Green, Plaintiffs have  
19 not "realized [a] decrease in value." Kaing, 2010 WL  
20 625365, at \*5; Tingley, 2008 WL 1902108, at \*5 n.3;  
21 Green, 2007 WL 2688612, at \*3. Furthermore, the injury  
22 is speculative, rather than actual or imminent, because  
23 economic conditions affecting the value of Plaintiffs'  
24 houses are subject to change with broader economic  
25 conditions. Green, 2007 WL 2688612, at \*3; Tingley, 2008  
26 WL 1902108, at \*4 ("it is just as plausible that a  
27 positive change in the unemployment rate, the housing  
28

1 market, the mortgage interest rates or other economic  
2 factors could cause an increase in [Plaintiffs'] property  
3 value[s].") (emphasis added). Thus, the alleged decline  
4 in value that Plaintiffs claim to have suffered may  
5 vanish before Plaintiffs suffer a concrete injury. See  
6 Kaing, 2010 WL 625365, citing Lujan, 504 U.S. at 560-61.

7  
8 To bolster their claim and distinguish the facts here  
9 from Tingley and Green, Plaintiffs allege they suffered  
10 additional injuries: "[U]nstable neighborhoods, multiple  
11 families living in one home, transient neighbors with no  
12 long-term ties to the neighborhood, unfinished and  
13 unkempt yards, and in some cases, increased crime." (See  
14 Stephens Opp'n at 13.) This attempt fails, however,  
15 because Plaintiffs' FAC contains nothing more than  
16 speculation to link these harms to Defendants' conduct or  
17 omissions. See Kaing, 2010 WL 625365, at \*5-6 (holding  
18 that plaintiffs claiming similar injuries failed to  
19 allege a cognizable injury in fact). See Section  
20 III(A)2, below.

21  
22 Plaintiffs also attempt to distinguish this case from  
23 Tingley and Green by arguing that the plaintiffs in those  
24 cases did not allege a failure to disclose or that the  
25 prices of their houses were "artificially inflated" as a  
26 result of the defendant homebuilders' conduct. (Stephens  
27  
28

1 Opp'n at 13.) The existence of an additional allegation  
2 of harm, however, does not salvage the FAC.

3  
4 Moreover, Plaintiffs fail to distinguish their case  
5 from Kaing, in which the plaintiff claimed failure to  
6 disclose and also alleged she was overcharged. 2010 WL  
7 625365, at \*2. Plaintiffs fail to persuade the Court  
8 that these factors are sufficient to transform their  
9 speculative harms into a cognizable injury in fact.

10  
11 Plaintiffs rely on Friends of the Earth, Inc. v.  
12 Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000), to  
13 argue they have pled a cognizable injury in fact.  
14 (Stephens Opp'n at 9-10.) There, the Supreme Court  
15 considered the ability to sue for environmental harm, and  
16 held that a citizen adequately pled an injury in fact by  
17 alleging the defendant's pollution interfered with  
18 recreational opportunities. 528 U.S. at 183. Plaintiffs  
19 point to language in the opinion referring to an alleged  
20 diminution in the value of the litigants' property. Id.  
21 at 182-83. A diminution in value that is tied to a  
22 physical change in the neighborhood's environment, such  
23 as pollution in the case of Friends of the Earth, is  
24 better characterized as concrete and particularized, and  
25 actual or imminent, than a purely economic change in a  
26 neighborhood. Lujan, 504 U.S. at 560-61.

1           When faced with similar facts, the district court in  
2 Kaing found the plaintiff had failed to plead actual  
3 injury. 2010 WL 625365, at \*5 ("Compared to the  
4 diminution in value that is tied to a physical change to  
5 the neighborhood's environment, such as pollution . . . a  
6 decline in value that is tied to a purely economic change  
7 to a neighborhood is much more difficult to characterize  
8 as concrete and particularized, and actual or  
9 imminent."). The Kaing court noted a key difference  
10 between environmental harm tied to physical damage and  
11 economic harm: "[A diminution in value arising from  
12 economic harm] can potentially evaporate before Plaintiff  
13 has suffered a concrete injury, even in the absence of  
14 redress from the courts." Id. While environmental  
15 damage caused by pollution does not redress itself, the  
16 complex economic factors that affected the value of  
17 Plaintiffs' residences can improve. See Tingley, 2008 WL  
18 1902108, at \*4 n.3.

19  
20           The capacity for Plaintiffs' alleged injury to  
21 fluctuate with changes in the economy, "strongly  
22 suggests" that Plaintiffs' alleged injury is "conjectural  
23 and speculative, not actual or imminent." Green, 2007 WL  
24 2688612, at \*3; see Sanner v. Bd. of Trade of City of  
25 Chicago, 62 F.3d 918, 924 (7th Cir. 1995) (finding  
26 soybean farmers who refrained from selling their crops  
27 due to a depressed market price lacked standing to sue  
28

1 under Article III, while those who sold at the depressed  
2 price enjoyed standing because "[t]he fact of a sale at  
3 an allegedly depressed price establishes discernable  
4 injury in a manner in which a failure to sell cannot."),  
5 citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S.  
6 723, 743 (1975).

7  
8 Plaintiffs next argue they have suffered an injury in  
9 fact because California law permits real estate buyers to  
10 sue for rescission and damages when a seller fails to  
11 disclose material facts. (Stephens Opp'n at 10-11); see  
12 Reed v. King, 145 Cal. App. 2d 261 (1983). This argument  
13 fails, however, because it merely states the remedies  
14 available to plaintiffs in failure to disclose cases, but  
15 does not establish an injury.

16  
17 Furthermore, the facts in the cases Plaintiffs cite  
18 are distinguishable from the context of this case; the  
19 failure to disclose in the former cases recognized a duty  
20 to disclose (1) physical defects and legal impediments to  
21 use of real property, (Karoutas v. HomeFed Bank, 232 Cal.  
22 App. 3d 767, 771 (1991) (finding a duty to disclose where  
23 plaintiff's residence had substantial and permanent soil  
24 movement that required costly repairs); SanFran Co. v.  
25 Rees Blow Pipe Mfg. Co., 168 Cal. App. 2d 191, 205  
26 (finding a duty to disclose where a property was missing  
27 walls and subject to various building code violations);  
28

1 Graf v. Sumpter, 207 Cal. App. 2d 391, 392-93 (finding a  
2 duty to disclose where the land upon which plaintiffs'  
3 residence was built was not properly compacted, causing  
4 cracking and crumbling of the residence); or (2) in cases  
5 of extreme stigma, (Reed v. King, 145 Cal. App. 3d 261,  
6 267 (1983) (finding a duty to disclose where residence  
7 was site of gruesome multiple murders committed on the  
8 property, but noting that such circumstances were "highly  
9 unusual"))).

## 11 **2. Overpayment Theory**

12 Finally, as to Plaintiffs' overpayment theory, the  
13 Court construes these allegations as an attempt to  
14 describe Defendants' motives for issuing subprime loans.  
15 To the extent, however, that Plaintiffs allege they  
16 overpaid as a result of Defendants' efforts to inflate  
17 housing demand artificially by offering subprime loans,  
18 the Court finds the alleged injury is too speculative to  
19 constitute an injury in fact because it is not "concrete  
20 or verifiable." See Kaing, 2010 WL 625365, at \*3, n.2.  
21 Plaintiffs allege that Defendants "market[ed] materials  
22 that depicted the community as a stable, family[-]based  
23 neighborhood" (FAC ¶¶ 39, 40) and "provided . . . false  
24 and misleading standardized representations and  
25 advertisements regarding the value of the house sold[,]  
26 [t]he sales practice of selling to investors[,] and the  
27 desirability of the neighborhood where the house was  
28

1 sold" (FAC ¶ 77). Plaintiffs also allege that Defendants  
2 offered subprime loans to "artificially inflate[] demand"  
3 and thereby increase prices for houses in Plaintiffs'  
4 neighborhoods. (FAC ¶¶ 21, 32, 51-52.) As with  
5 Plaintiffs' reduced-value theory, the capacity for  
6 Plaintiffs' alleged injury to fluctuate with changes in  
7 the economy, "strongly suggests" that Plaintiffs' injury  
8 is "conjectural and speculative, not actual or imminent."  
9 Green, 2007 WL 2688612, at \*3.

10  
11 Thus, the Court finds that Plaintiffs have failed to  
12 articulate an injury in fact that is "concrete and  
13 particularized, and actual or imminent." Cf. Lujan, 504  
14 U.S. at 560-61.

15  
16 **B. Causation**

17 Plaintiffs "face[] a similarly insurmountable problem  
18 with respect to the causation element of standing."  
19 Kaing, 2010 WL 625365, at \*6. Plaintiffs allege they  
20 overpaid for their houses and suffered a reduction in the  
21 value of their properties caused by Defendants' wrongful  
22 acts and omissions. Plaintiffs' injury must be "fairly  
23 traceable to the challenged action of the defendant, and  
24 not the result of the independent action of some third  
25 party not before the court." Lujan, 504 U.S. at 560.  
26 "The line of causation between the [alleged] illegal  
27  
28

1 conduct and injury" must not be "too attenuated." Allen  
2 v. Wright, 468 U.S. 737, 752 (1984).

3  
4 **1. Reduced-Value Theory**

5 Plaintiffs' reduced-value injury is not "fairly  
6 traceable" to the challenged action of Defendants.  
7 First, any loss in value Plaintiffs have suffered has  
8 resulted not just from the actions of Defendants, but  
9 also from the independent actions of others, e.g.  
10 homeowners in Plaintiffs' neighborhoods who defaulted on  
11 their mortgages and third-party mortgage companies that  
12 foreclosed on houses in Plaintiffs' neighborhoods.  
13 Plaintiffs' theory is premised upon a chain of causation  
14 that is affected by general economic factors. These  
15 general factors can have unpredictable effects, such as  
16 collapse of financial institutions, changes in the credit  
17 market, and rising unemployment, which by themselves or  
18 in combination affect the housing market. In other  
19 words, any injuries suffered by Plaintiffs necessarily  
20 depend upon a causal chain that includes numerous  
21 independent forces and individual decisions of "some  
22 third part[ies] not before the court." Lujan, 504 U.S.  
23 at 560-61.

24  
25 Plaintiffs allege that Defendants (1) "marketed the  
26 house and neighborhood as stable and desirable" (FAC ¶¶  
27 20, 39-40, 45, 89, 96); (2) sold houses to "unqualified  
28

1 and high-foreclosure-risk buyers" and assisted them in  
2 purchasing or financing their houses (FAC ¶¶ 21, 24); (3)  
3 sold houses to "investors that were not owner[-]occupiers  
4 of the houses," (FAC ¶¶ 21, 26, 50); and (4) did not  
5 disclose this information to Plaintiffs (FAC ¶ 30, 30-40,  
6 49, 70). Plaintiffs conclude that as a result of  
7 Defendants' conduct, the "neighborhoods where Plaintiffs  
8 live have had a number of foreclosures," which "have  
9 resulted in substantial loss of value to the surrounding  
10 homes." (FAC ¶ 52.)

11  
12 As Defendants point out, an examination of the causal  
13 chain reveals the speculative nature of Plaintiffs'  
14 injuries. (Lennar Mot. at 9.) Plaintiffs allege that  
15 Defendants sold houses in Plaintiffs' neighborhoods to  
16 "unqualified" buyers. Plaintiffs define as "unqualified"  
17 those buyers who purchased their houses with less than a  
18 20% down payment. Later, some of these unqualified  
19 buyers defaulted on their mortgage loans. Eventually,  
20 third-party mortgage companies foreclosed on those  
21 houses; Defendants did not initiate these foreclosure  
22 proceedings. The loss of houses due to foreclosure --  
23 along with other factors -- eventually contributed to a  
24 decrease in the value of Plaintiffs' houses. (See  
25 Stephens Opp'n at 9.) When examining the chain of events  
26 Plaintiffs allege, it is apparent that the Plaintiffs'  
27 alleged injuries necessarily depend upon a causal chain

28

1 that includes numerous independent forces and individual  
2 decisions of "some third part[ies] not before the court."  
3 Lujan, 504 U.S. at 560-61.

4  
5 Other courts have reached the same conclusion when  
6 faced with nearly identical allegations. See Kaing, 2010  
7 WL 625365, at \*6; Tingley, 2008 WL 1902108, at \*4; Green,  
8 2007 WL 2688612, at \*3. As the Kaing and Tingley courts  
9 noted, a causal chain cannot be found or even inferred  
10 from such allegations because each link in the chain may  
11 be caused by factors other than Defendants' conduct.  
12 Kaing, 2010 WL 625365, at \*6; Tingley, 2008 WL 1902108,  
13 at \*4. For example, the other owners may have defaulted  
14 on their mortgages as a result of "other factors, such as  
15 unemployment, health problems, a general weakening of the  
16 economy, or other financial conditions." Tingley, 2008  
17 WL 1902108, at \*4. Furthermore, there are "intervening  
18 decisions by the mortgage assignees to foreclose the  
19 defaulted mortgages rather than to restructure the loans,  
20 which may have been done for reasons totally apart from  
21 the alleged fraud." Id.

22  
23 The allegations that the depreciation of Plaintiffs'  
24 property was caused by the foreclosures in their  
25 neighborhood, "rather than as a result of a myriad of  
26 other factors, such as rising unemployment in the region,  
27 changes in the housing market, or other economic

1 conditions," falls short of the standard required to  
2 plead causation. Kaing, 2010 WL 625365, at \*6. Although  
3 foreclosures can have an adverse impact on property  
4 values, supply and demand are affected simultaneously by  
5 a number of market factors. See Tingley, 2008 WL  
6 1902108, at \*4. Any combination of these factors may  
7 have caused a reduction in Plaintiffs' property values.  
8 See id. Even assuming that the value of Plaintiffs'  
9 property was affected adversely by foreclosures in their  
10 neighborhoods, the connection "remains too tenuous to  
11 provide standing." Id.

12  
13 The additional injuries Plaintiffs allege in the FAC  
14 -- "unstable neighborhoods, multiple families living in  
15 one home, transient neighbors with no long-term ties to  
16 the neighborhood, unfinished and unkempt yards, and in  
17 some cases, increased crime" -- are not "fairly  
18 traceable" to the challenged action of Defendants.  
19 Viewing the allegations in FAC in the light most  
20 favorable to Plaintiffs, Plaintiffs fail to plead facts  
21 sufficient "to raise a right to relief above the  
22 speculative level." Bell Atlantic, 550 U.S. at 555. The  
23 FAC contains nothing more than speculation to link these  
24 harms to Defendants' conduct or omissions. See Kaing,  
25 2010 WL 625365, at \*5-6 (holding that plaintiffs claiming  
26 similar injuries failed to allege causation sufficient to  
27 survive a motion to dismiss).

28

1       The fragility of the connection between Defendants'  
2 alleged conduct and the decreased value of Plaintiffs'  
3 houses is illuminated "with each additional link in the  
4 chain where the choices of others have an impact and make  
5 other scenarios at least as plausible as the one advanced  
6 by . . . Plaintiffs." Id. Put into concrete terms,  
7 because Plaintiffs still own their properties, a positive  
8 change in the unemployment rate, housing market, mortgage  
9 interest rates, or other economic factors could cause  
10 Plaintiffs' property values to increase, thus decreasing  
11 or obviating their alleged losses. Again, other courts  
12 reached the same conclusion. Tingley, 2008 WL 1902108,  
13 at \*4; Green, 2007 WL 2688612, at \*3.

## 14

### 15       **2. Overpayment Theory**

16       Turning to Plaintiffs' overpayment theory, the Court  
17 construes these allegations as an attempt to describe  
18 Defendants' motives for issuing subprime loans. To the  
19 extent, however, that Plaintiffs allege they overpaid for  
20 their houses as a result of Defendants' efforts to  
21 inflate housing demand artificially by offering subprime  
22 loans, the causal connection between the alleged  
23 overpayment and Defendants' "scheme" depends upon  
24 numerous independent factors and third parties not before  
25 the court. See Kaing, 2010 WL 625365, at \*6.

26  
27  
28

1 The third parties include, for example, the alleged  
2 "unqualified" and "investment" buyers to whom Plaintiff  
3 also indirectly assign blame for the decrease in their  
4 property values. These third parties acted  
5 independently, e.g., to default on loan payments, to  
6 choose their tenants, or to maintain their properties,  
7 which in turn directly affect losses Plaintiffs allegedly  
8 suffered, thus making it impossible to trace those losses  
9 to Defendants' alleged misconduct.

10  
11 Similarly, the "housing bubble," or inflation of  
12 housing prices, was a nationwide phenomenon, traceable to  
13 variables independent of Defendants' alleged scheme, such  
14 as lax regulatory enforcement, rates of unemployment,  
15 credit market developments, and general economic growth.  
16 As with Plaintiffs' reduced-value theory, it cannot be  
17 said that the inflated purchase prices Plaintiffs  
18 allegedly paid are fairly traceable to Defendants'  
19 alleged "scheme."

20  
21 Thus, taking Plaintiffs' allegations as true, as the  
22 Court must for these purposes, Plaintiffs' harm is not  
23 "fairly traceable" to Defendants' alleged conduct.  
24 Plaintiffs, therefore, do not have standing to sue for  
25 paying an "inflated" purchase price for their houses or  
26 for a subsequent reduction in value of their houses.  
27 Hence, the Court lacks subject matter jurisdiction over  
28

1 this action and accordingly DISMISSES the FAC,<sup>3</sup> with  
2 prejudice.

3

4

**IV. CONCLUSION**

5 For the foregoing reasons, the Court GRANTS  
6 Defendants' Motion to Dismiss. As the Court finds that  
7 Plaintiffs would be unable to amend their pleadings to  
8 correct the deficiencies related to constitutional  
9 standing, it dismisses the First Amended Complaint with  
10 prejudice.

11

12 The Court DENIES Defendants' Motion to Strike as  
13 moot.

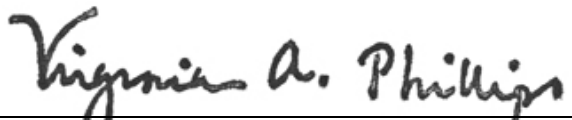
14

15 **IT IS SO ORDERED.**

16

17

18 Dated: March 31, 2010

  
\_\_\_\_\_  
VIRGINIA A. PHILLIPS  
United States District Judge

19

20

21

22

23

24

25

26 <sup>3</sup> As the Court finds Plaintiffs lack standing to  
27 assert their claims, it does not have jurisdiction over  
28 this matter. The Court, accordingly, does not reach  
Plaintiffs' and Defendants' arguments regarding Rule 9  
and 12(b)(6) as to each claim.